

MEMORANDUM OF AGREEMENT BETWEEN THE JUSTICE AND PUBLIC SAFETY CABINET AND THE DEPARTMENT OF PUBLIC ADVOCACY

By Executive Order No. 2004-730, the Department of Public Advocacy (the Department) has been "attached for administrative purposes" to the Justice and Public Safety Cabinet (the Cabinet). Because the Cabinet and the Department want to address clearly any potential conflicts of interest and other problems that might arise with this transition to a new structure, it has been decided to enter into a formal agreement governing the manner in which conflicts of interest will be avoided.

1. The need for law enforcement agencies in the Justice Cabinet to have private discussions and information

There are several agencies now located in the Justice and Public Safety Cabinet that have as their primary mission the enforcement of the law. The Cabinet often has meetings at which commissioners and other officials of Cabinet agencies are present and at which policy matters are discussed. The Cabinet and Department agree that there will be times when the Public Advocate and other departmental officials will not be able to be a part of those meetings at which sensitive law enforcement issues will be discussed. The Cabinet Secretary or Deputy Secretary, or their designee will be responsible for identifying those meetings or discussion areas where the presence of the Department will not be allowed.

2. The need for an independent indigent defense function

The most crucial component of the system of indigent defense system is the guarantee of institutional independence irrespective of where the indigent defense function is placed in government. The *ABA Standards for Criminal Justice, Providing Defense Services* (3rd Ed. 1992), Standard 5-1.3(a) requires the system to protect the integrity of the attorney/client relationship. "The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client...[t]he [public defender] plan and the lawyers serving under it should be free from political influence." "[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312 (1981).

The *ABA Ten Principles of a Public Defense Delivery System* (February 2002) lists as Principle #1 the following: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." The commentary to that principle elaborates as follows: "The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned

counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit..."

Kentucky since 1972 has placed the responsibility for providing an independent indigent defense function in the Executive Branch. This function was placed in the Department of Public Advocacy with the passage of KRS Chapter 31. "We thus feel it appropriate to emphasize that DPA's duty to provide counsel is an executive agency function. It is an obligation which exists independently of and apart from DPA's responsibilities as advocate--and must be so kept." *Pillersdorf v. Department of Public Advocacy*, Ky., 890 S.W.2d 616 (1994).

There is no place in government where the indigent defense function could be placed without there being some level of conflict. The majority of states have placed this function within the Executive Branch. It is believed that while there are inherent conflicts of interest present with this function being placed in the Executive Branch, these conflicts can be managed. "[T]he law of lawyering must focus on identifying conflicts of interest in a realistic manner, and regulate them in such a way as to avoid infringing on the effective representation of clients, where elimination of the conflict is not practical." Hazard and Hodes, *The Law of Lawyering*, Section 10.1 (2003). See also *Kentucky Rules of Professional Conduct*, Rule 1.7(b). Regulating these potential conflicts is one of the purposes of this memorandum of agreement.

3. How independence of indigent defense will be assured.

Independence of the system of indigent defense in Kentucky will be guaranteed within the structure of Executive Order No. ~~2004-73~~ in the following ways:

- ◆ The Justice Cabinet affirms the importance and guarantees the independence of the indigent defense function in Kentucky's criminal justice system.
- ◆ The Department is denominated in the Executive Order as an "independent state agency attached for administrative purposes to the Justice and Public Safety Cabinet."
- ◆ The Public Advocate is not delineated in the Executive Order as being directly responsible to the Justice Cabinet Secretary, as are other Commissioners in the Cabinet. Rather, the Public Advocate is required to report on administrative matters to the Justice Cabinet Secretary similarly to that required of the Parole Board, another independent state agency attached to the Justice Cabinet for administrative purposes.
- ◆ The Public Advocacy Commission will continue as created in KRS 31.015. This Commission has as one of its statutory duties to "[a]ssist the Department of Public Advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system." KRS 31.015(6)(d). The Public Advocacy Commission is also charged with the reviewing of "the performance of the public advocacy system" and the providing of "general supervision of the public advocate." KRS 31.015(6)(c). The *ABA Standards*

for *Criminal Justice, Providing Defense Services* (3rd Ed. 1992), Standard 5-1.3(b) offers a structural way to ensure the independence that protects the integrity of the attorney/client relationship, "An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees."

- ◆ The Public Advocacy Commission is prohibited from interfering "with the discretion, judgment, or advocacy of employees of the Department of Public Advocacy in their handling of individual cases." KRS 31.015(7).
- ◆ Likewise, the Cabinet pledges not to interfere in any way with the discretion, judgment, or advocacy of employees of the Department of Public Advocacy in their handling of individual cases.
- ◆ The Public Advocate is the appointing authority for the Department of Public Advocacy. It is important for the Public Advocate to ensure that an adequate process exist for both the selection and appropriate level of supervision for all staff within the Department of Public Advocacy. The Public Advocate is charged with determining the necessary personnel for the Department. KRS 31.020(1). The Public Advocate is charged with appointing assistant public advocates, secretarial, clerical, and other personnel within the merit system. KRS 31.020(4)(5). The Public Advocate is also charged with appointing a nonmerit deputy public advocate. KRS 31.020(3). The Public Advocacy Commission is charged with assisting the Public Advocate "in drawing up procedures for the selection of his staff." KRS 31.015(6)(b). The Cabinet recognizes that the Department has a professional obligation under Rule 5.1 of the *Kentucky Rules of Professional Conduct* to ensure that departmental lawyers conform to the Rules. The Cabinet will not interfere with the Department's efforts to ensure compliance with Rule 5.1. The Public Advocate will report to the Cabinet any proposed discipline of a departmental employee and receive advice from the Cabinet regarding the appropriateness of the proposed discipline.
- ◆ The Department will maintain its own General Counsel. The General Counsel will represent the Department on all agency legal matters. The Department will defend itself before the state Personnel Board and state Board of Claims.
- ◆ The Cabinet understands and respects the attorney client relationship between the employees of the Department and their clients. See Generally Rule 1.6 of the *Kentucky Rules of Professional Conduct*. The Cabinet will endeavor to maintain the confidentiality of client communications as contained in the offices of the Department, or the computers used by employees of the Department. The Cabinet will not breach this confidentiality in the exercise of administrative oversight of the Department. The Cabinet will not seek client information from the Department, nor will it use any client information with which it comes into contact.
- ◆ The Department will have control over its information technology equipment and use. The Department will work with the Commonwealth Office of Technology to ensure that the Department's information technology is in conformity with the requirements of state government. The Cabinet and the Department will take all necessary steps to ensure that reasonable procedures

are in place to guarantee client confidentiality. See *ABA Formal Opinion 95-398* (1995) and Rules 1.6, 1.9 and 5.3 of the *Kentucky Rules of Professional Conduct*. The Department will take necessary steps to ensure that reporting responsibilities will be accomplished without revealing client confidentiality, including data that can be traced to a specific client. The Cabinet and the Department agree that there can be no access by the Cabinet, by computer or otherwise, to confidential matters that can be traced to any individual client of an attorney with the Department.

- ◆ The Cabinet will not require the use of a letterhead that communicates to the Department's clients that they are part of the Cabinet. Rather, the Department will be allowed to use a suitable departmental letterhead that ensures clients that they are represented by a lawyer working for an independent state agency. See generally KBA Ethics Opinion KBA E-417.

4. Administrative Relationship

The Department is placed within the Cabinet "for administrative purposes." The Public Advocate is the "chief administrator of the Department for Public Advocacy." KRS 31.020(2). The Department and Cabinet will work together on ensuring a transparent, efficient, and accountable administrative function in the Department.

The Public Advocate is responsible for reporting to the Cabinet. This includes but is not limited to the following:

- ◆ Reporting on pro cards.
- ◆ Reporting on discipline imposed.
- ◆ Reporting on monthly budget summary.

5. Potential for Lawsuits

In the past, the Department has been involved in a few lawsuits filed on behalf of indigent defense clients filed against agencies of the Justice and Public Safety Cabinet as well as other agencies in state government. All of these lawsuits were filed on behalf of clients, and were authorized by the Department's enabling statutes contained in KRS Chapter 31. These lawsuits can occur in a number of different ways:

- ◆ Lawsuits filed on behalf of persons with mental illness or mental retardation by attorneys with the Protection and Advocacy Division against state agencies and other providers of services. KRS 31.010(2).
- ◆ Lawsuits filed as part of post-conviction proceedings. KRS 31.110(2)(c).
- ◆ Lawsuits filed by attorneys with the Juvenile Post-Dispositional Branch related to issues involving violations of federal or state statutory rights or constitutional rights. KRS 31.110(4).
- ◆ Lawsuits filed in federal court on matters arising out of or related to actions pending or recently pending in state court. KRS 31.210. These include post-conviction actions initiated by the filing of a petition for a writ of habeas

corpus. These may also include Section 1983 actions in capital post-conviction cases in challenging procedures used by the Commonwealth.

- ◆ Lawsuits filed to secure special education remedies for juvenile clients where such remedies are pursued to create less restrict alternatives or lead the court system to divert the case into a civil forum.
- ◆ Civil remedies in non-support cases.
- ◆ Lawsuits to enforce the legal right of prisoners and jail inmates. See, for example, *Campbell County v. Kentucky Corrections Cabinet*, Ky., 762 S.W. 2d 6 (1988); *Lexington-Fayette Urban County Detention Center v. Crockett*, Ky., 786 S.W. 2d 869 (1990).
- ◆ It is departmental policy that when a DPA attorney files suit in state or federal court against another state agency the DPA must give notice to the Public Advocate and the Justice and Public Safety Cabinet Secretary. Notice includes a copy of the demand letter on the day the demand letter is sent, unless there are exceptional circumstances that exist. Notice also consists of notice that negotiations have broken down and that litigation will be pursued. See DPA Policy 13.03.

“[A]n indispensable element of the effective performance of [a public defender’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.” *Ferri v. Ackerman*, 444 U.S. 193 (1979). The Cabinet and the Department agree as follows regarding these lawsuits:

- ◆ The Cabinet agrees that lawsuits can be expected to be filed by attorneys with the Department on behalf of clients against agencies within the Cabinet and other entities.
- ◆ The Department agrees that the lawsuits that will be filed will be authorized within KRS Chapter 31.
- ◆ The Cabinet will not interfere with the right of the Department’s clients to seek relief through the filing of a lawsuit.
- ◆ If a civil suit is brought by the Department rather than on behalf of individual clients or classes of clients, those lawsuits shall be approved by the Public Advocate prior to their filing. DPA Policy 3.19.

6. The Protection and Advocacy Division

The Protection and Advocacy Division (P&A) is largely a creature of federal law. It provides civil legal advocacy services to persons with disabilities in matters arising out of their disabling condition. P&A derives its authority to act and funding largely from two major federal laws: the Developmental Disabilities Assistance and Bill of Rights Act, (DD ACT) 42 U.S.C. § 15000 et seq.; and the Protection and Advocacy for Individuals with Mental Illness Act, (PAIMI) 42 U.S.C. § 10805 et seq. Each of these statutes grants the P&A Division powers and authority as well as provides a funding stream through accompanying formula grants.

As a condition of the Commonwealth’s continuing receipt of a substantial funding allotment under Part B of the DD Act, 42 U.S.C. §§ 15021 et seq., the Commonwealth made written

assurances to the federal Department for Health and Human Services that P&A shall have the authority to perform all the functions anticipated by Congress as essential to carrying out its mandate. Under the doctrine of pre-emption and the provisions of the supremacy clause of the U.S. Constitution, the Protection and Advocacy Division has authority and power to perform its functions despite state statutes or rules that may be contrary.

In carrying out its mission, P&A has federal statutory authority to:

- ◆ Pursue legal, administrative, and other appropriate remedies or approaches, 42 U.S.C. §15043(a)(2)(A)(i)
- ◆ Investigate incidents of abuse and neglect of individuals with disabilities in state facilities. 42 U.S.C. §15043(a)(2)(B)
- ◆ Be independent of any agency that provides treatment, services, or habilitation to individuals with developmental disabilities; 42 U.S.C. §15043(a)(2)(G).
- ◆ Be independent of any agency in the State that provides treatment or services (other than advocacy services) to individuals with mental illness 42 U.S.C. §10805(a)(2).
- ◆ Hire and maintain staff without being subjected to state hiring freezes or other state policies that would prevent the P&A from carrying out its functions funded with federal funds. 42 U.S.C. §15043(a)(2)(K).
- ◆ Provide education and information to policymakers. 42 U.S.C. §15043(a)(2)(L).

In carrying out its function P&A will on occasion, in the course of client representation, bring a legal action against the state, an agency of the state or an instrumentality of the state. P&A is specifically authorized under federal law to take such action. See 42 U.S.C. §15044(b)(1). When such actions are filed, P&A observes the same protocol concerning notice to the Public Advocate and the Cabinet Secretary as is set out in the sections concerning indigent defense services.

7. Budget Matters

The Department is part of the Cabinet administrative structure. The Department's budget request will be provided to the Cabinet in the fall prior to the budget session of the General Assembly on a date and format to be required by the Cabinet. The Department recognizes that the budget presented by the Cabinet to the Governor will involve the making of decisions requiring balancing of needs and tradeoffs between the various agencies of the Cabinet and available resources. The Cabinet recognizes that the Department may have to demonstrate to members of the General Assembly what the budgetary needs of indigent defense are. The Cabinet also recognizes that the Public Advocacy Commission has an obligation to "provide support for budgetary requests to the General Assembly." KRS 31.015(7).

8. The Department's Public Policy Role

KRS 31.030(4), (7), (8), (9), and (13) all relate to departmental functions beyond the representation of individual clients. These refer to the public policy role of the Department. The Department plays a vital role in the public policy making arena,

including the legislative process, often being asked to comment on proposed legislation, to propose legislation, to serve on task forces and commissions, and to otherwise lend its expertise on issues relating to public defense and the rights of individuals with disabilities. On occasion, departmental publications such as *The Advocate* and *The Legislative Update* contain matters of public policy. When the Department plays this institutional role, it results in multiple perspectives on issues being offered to legislators and other policy makers, resulting in more informed and superior decision-making by legislators. The Cabinet and Department agree as follows regarding the Department's public policy role:

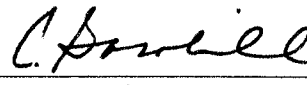
- ◆ The Cabinet agrees that the Department plays an institutional role in the public policy arena.
- ◆ The Department agrees to keep the Cabinet informed on the public policy positions taken by the Department.
- ◆ No Department employee will take a public policy position regarding the Department without the prior approval of either the Public Advocate or his or her designee.
- ◆ The Cabinet and the Department recognize that DPA lawyers have a legal and ethical right to speak independently within the bounds of the Kentucky Rules of Professional Conduct on behalf of their clients to the media.

9. The need to establish a good working relationship.

Department of Public Advocacy and Justice and Public Safety Cabinet employees, attorneys, supervisors, managers, and directors will be working together on many issues. Sometimes the work will be done on a collaborative basis. Sometimes the work will be adversarial. At all times efforts will be made to establish a good, civil, and professional working relationship.



Lt. Governor Steve Pence Date
Secretary
Justice and Public Safety Cabinet

 7/2/04

Cleve Gambill Date
Deputy Secretary
Justice and Public Safety Cabinet

 6/25/04

Joe Whittle Date
Executive Director
Office of Legal Services
Justice and Public Safety Cabinet

 6/25/04

Erwin W. Lewis Date
Public Advocate
Department of Public Advocacy

**ADDENDUM TO THE MEMORANDUM OF AGREEMENT
BETWEEN THE JUSTICE AND PUBLIC SAFETY CABINET AND
THE DEPARTMENT OF PUBLIC ADVOCACY**

This addendum to an existing Memorandum of Agreement (MOA) between the Justice and Public Safety Cabinet and the Department of Public Advocacy shall operate in conjunction with the previous MOA.

The purpose of this addendum is to clarify and reconcile the original MOA with Executive Order No. 2004-730, by addressing statements in the first MOA that were attributed to the Executive Order, which, however, did not appear in the signed version of the Executive Order.

It is the express agreement between the Department of Public Advocacy (DPA) and the Justice and Public Safety Cabinet (Justice Cabinet) that DPA is an independent state agency attached to the Justice Cabinet for administrative purposes. The Justice Cabinet recognizes that DPA must operate as an independent state agency, as stated in KRS Chapter 31. Neither this Executive Order nor MOA shall void or otherwise alter the intent or language of KRS 31.

Executive Order No. 2004-730 does not require DPA to report to the Justice Cabinet. However, the Justice Cabinet and DPA agree that there is a need for administrative information to be provided to the Cabinet by DPA. DPA agrees to file reports with the Justice Cabinet Secretary, or his designee, on its administrative actions, including budget requests, past personnel disciplinary actions and financial expenditures. These reports shall be made in a manner that keeps the Justice Cabinet sufficiently apprised of pending actions and future requests. Filing these necessary reports shall in no way be deemed to reduce DPA's independence, rather this reporting is necessary to allow the Justice Cabinet to perform its fiscal responsibilities and other obligations owed to the citizens of the Commonwealth.

DPA agrees to continue its practice of giving advanced notice to the Cabinet Secretary of occasions in which a representative of DPA will testify before a legislative or other policy creating body. Such notice will be provided in a manner that will foster quick communication, but will not disturb DPA's independence as expressed in KRS 31.

When asked by the Public Advocate, the Justice Cabinet's Office of Investigations may be used to investigate allegations of employee misconduct.

The Justice Cabinet and DPA also agree to encourage discussing disagreements with other Justice Cabinet agencies with a goal of resolving disputes between these entities (and the parties so represented) in advance of filing a lawsuit where possible. This agreement shall not effect DPA's independence to prosecute a lawsuit and also recognizes the need for the court system to resolve disputes.

St B. Pence

Lt. Governor Steve Pence Date
Secretary
Justice and Public Safety Cabinet

C. Gambill 8/30/04

Cleve Gambill Date
Deputy Secretary
Justice and Public Safety Cabinet

Joe Whittle

Joe Whittle Date
Executive Director
Office of Legal Services
Justice and Public Safety Cabinet

Erwin W. Lewis 8/27/04

Erwin W. Lewis Date
Public Advocate
Department of Public Advocacy